

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding)

) PP Docket No. 93-253
)
)

To: The Commission

COMMENTS OF THE SMALL RSA OPERATORS**SMALL RSA OPERATORS**

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SUMMARY

The Small RSA Operators, comprised of small entrepreneurs who have ownership interests in and are actively involved with the operation of RSA cellular systems, disagree with the Commission's proposal to process pending cellular applications for unserved areas by auction rather than lottery. There is no "abuse" to be remedied by the use of auctions because the Commission has already stemmed the tide of "speculation" through its lottery system and the promulgation of strict unserved area rules designed to prevent insincere speculators from applying. Moreover, the move from lotteries to auctions will only serve to further delay the issuance of licenses for the unserved areas and prolong the initiation of service for years. Also, such a shift in midstream is so arbitrary and capricious as to violate the procedural due process rights of pending unserved area applicants. Finally, the use of auctions for processing pending unserved area applications is contrary to Congressional intent and therefore exceeds the Commission's authority.

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COMMENTS OF THE SMALL RSA OPERATORS

Garry Samuels, Daryl Morrow and Jack Solomonson (collectively, the "Small RSA Operators"), by their attorneys and pursuant to Section 1.419 of the Commission's Rules, hereby submit these Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 93-455, released October 12, 1993 (hereinafter "NRPM"). As discussed in more detail below, each of the Small RSA Operators (a) is an officer and part owner of an operating RSA cellular system; (b) is actively involved in the management of his RSA cellular system; (c) acquired his interest through the Commission's RSA application processes, as a party to an initial construction permit application filed during the 1988 RSA filing windows; (d) constructed the RSA system after receiving the initial authorization; and (e) timely filed applications for a limited number of unserved area cellular markets, with the intention of constructing and operating unserved area cellular systems to serve the public, the same as he is now doing in his RSA market.

In these Comments, the Small RSA Operators address only one aspect of the NPRM -- the misguided proposal to process pending unserved area applications via auction. See NPRM at ¶160. The

Commission can process these applications months (or years) faster by just conducting lotteries. There is no real potential for abuse by "speculators" if lotteries are held. In the case of every other pending application for other services, the Commission has opted for more rapid licensing, faster implementation of service, and less administrative burden through completion of the lottery process. For the reasons set forth herein, the Commission should cut short its consideration of the use of auctions for already-pending unserved area applications, and do as it is doing in MDS, SMR, IVDS, PCP, 220 MHz, MAS and every other service -- conduct the lotteries and issue authorizations as soon as possible.

I. The Existence of the Small RSA Operators Proves That Not All RSA Applicants or Unserved Area Applicants Were "Speculators"

Garry Samuels is the president and chief executive officer of Lone Star Cellular, Inc. ("Lone Star") which operates a five-cell system serving Texas RSA No.1 - Runnels (Markets No. 660-A) under call sign KNKN457. (Lone Star is the corporate successor to Cell-Phone Communications Network, a general partnership composed of Lone Star's stockholders which was the original lottery winner.) In Lone Star's case, the original lottery winner operates the cellular system to this day. Manifestly, Garry Samuels is not a "speculator".

Lone Star itself filed an unserved area application for the adjacent Abilene MSA. Additionally, Garry Samuels filed individual unserved area applications for twenty specific markets he believed would be viable, with the understanding that the unserved area

cellular rules require construction within one year and operations for one year after construction before an unserved area licensee may sell or assign its system.

Daryl Morrow is secretary/treasurer and a director a Pro-Max Communications, Inc., successor to Pro-Max Communications, which operates a five-cell system serving Alabama RSA No.6 - Washington, Market No. 312-A under call sign KNKN679. In Pro-Max's case, the original lottery winner operates the cellular system to this day. Manifestly, Daryl Morrow is not a "speculator".

Daryl Morrow filed unserved area applications for twenty specific markets he believed would be viable, with the understanding that the unserved area cellular rules require construction within one year and operations for one year after construction before an unserved area licensee may sell or assign its system.

Jack Solomonson is President and CEO of Peninsula Communications, Inc., a general partner in Cellular North Michigan Network General Partnership via full-market settlement among the original applicants for Michigan RSA No.3 - Emmet (Market No. 474-B) call sign KNKN698 and Michigan RSA No.5 - Manistee (Market No. 476-B) call sign KNKN910. The combined Michigan RSAs Nos. 3/5 system has twelve cells operating. Jack Solomonson is also a former member of the CTIA Board. Mr. Solomonson also operates a rural telephone company in Traverse County, Michigan, serving areas that Michigan Bell and GTE originally declined to serve. Manifestly, Jack Solomonson is not a "speculator".

Jack Solomonson filed unserved area applications for twenty specific markets he believed would be viable, with the understanding that the unserved area cellular rules require construction within one year and operations for one year after construction before an unserved area licensee may sell or assign its system.

The Small RSA Operators are representative of a larger group of small entrepreneurs who are and always have been sincere applicants who desire to serve the public, who have constructed cellular systems in MSAs or RSAs, and who filed applications to serve some of the unserved areas. The Small RSA Operators have experience in running a tight ship, providing quality service without ignoring costs, and thereby making their respective rural systems viable. The Small RSA Operators are precisely the type of licensees that the Commission should want to attract (and did attract) to the unserved area lottery process, if expedition of cellular service to these long-unserved areas is really the Commission's goal.¹ Unfortunately, the NPRM appears geared toward trampling the needs of the public and the rights of the Small RSA Operators in a desperate attempt to throw a windfall to the same large MSA multi-system operators that failed to construct in a timely manner in the first place.

¹ At least until the present NPRM was issued, the Commission had recognized that expediting the introduction of service ought to be the highest priority. See, e.g., First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd. 6185, 6196 & n.16 (1991) ("First Report and Order").

II. The Pre-Existing Modified Unserved Area Lottery System Had Already Succeeded in Eliminating Insincere "Speculators" from Applying for Licenses -- There Is No Abuse to Be "Remedied" by Auctions

In response to what the Commission perceived as faults in its cellular lottery system as applied in the RSA markets, the Commission initiated a rulemaking to modify that system for the unserved area markets.² So intent was the Commission upon stamping out the perceived abuse of speculation almost to the exclusion of all other regulatory goals, that the Commission issued multiple pronouncements in that proceeding³ and held off from setting any filing windows until March, 1993. As a result, the denial of service to these geographic areas was prolonged for years, and cellular operators such as the Small RSA Operators were unable to obtain licenses and begin providing service.

Finally, with its Third Report and Order, supra, and the establishment of deadlines for both SIU Maps⁴ and filing applications,⁵ the Commission began the unserved area licensing process. The final rules as adopted by the Commission prohibited

² See Amendment of Part 22 (Unserved Area Cellular) Notice of Proposed Rulemaking in CC Docket No. 90-6, 5 FCC Rcd. 1044 (1990).

³ See, e.g., First Report and Order, supra; Further Notice of Proposed Rulemaking in CC Docket No. 90-6, 6 FCC Rcd. 6158 (1991); Second Report and Order, 7 FCC Rcd. 2449 (1992); Third Report and Order and Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 7183 (1992) ("Third Report and Order").

⁴ See, Public Notice, Report No. CL-93-23, released November 13, 1992.

⁵ See, Public Notice, Report No. CL-93-36, released December 23, 1992.

even minor ownership changes in pending applications,⁶ required commencement of operations within only twelve months from issuance of the initial authorization,⁷ and prohibited any unserved area licensee from even asking for Commission approval to sell its system until one year after commencing operations.⁸

Due to these Commission rule changes, the number of unserved area cellular applications actually filed when the windows were opened in March - May, 1993 fell dramatically below what would have occurred under the old RSA lottery regime. The unserved area market with by far the most applications was Market No. 2-B (Los Angeles). See, Public Notice, Report No. CL-93-79, released April 14, 1993. This market, with its large population and its huge stretches of heavily-traveled Interstates 10 (to Phoenix) and 40 (to Grand Canyon/Flagstaff) and 15 (to Las Vegas), is far more lucrative than were any of the 428 RSA markets. Yet only 517 applications were filed for Market No. 2-B, id., compared to 910 applications for each of RSA Markets New Jersey RSA No.2, and Maryland RSA No.2, the two most lucrative RSA markets.

Even the most attractive other unserved area markets had only a few hundred applicants, and many markets had less than twenty

⁶ See Section 22.922(b) of the Commission's Rules.

⁷ See Section 22.43(c)(2)(ii) of the Commission's Rules.

⁸ See Section 22.920(c)(3) of the Commission's Rules. As a practical matter, given the need to file applications in Pittsburgh and the statutory public notice requirements of Section 309 of the Communications Act of 1934 as amended ("Act"), 47 U.S.C. §309, no unserved area system can be sold until sixteen to eighteen months after commencing operations.

applicants.⁹ Patently, the unwanted "speculators" had either been culled out or had made the decision to change with the Commission and construct and operate. Either way, the RSA experience was not repeated at the unserved area application stage and would not be repeated at any other point in the process. In short, there is no evidence of "abuse", and therefore no rational basis for the Commission to continue to hold the residents and roamers in the unserved areas hostage while purporting to cure a nonexistent abuse.

III. Having Accepted the Unserved Area Applications through a Duly-Announced Filing Window, the Commission Cannot Workably Move to Auction Now

- A. Going to Auction Would Require the Commission to Afford Every Unserved Area Applicant the Opportunity to Amend to Meet the New Rule, Including Partial Settlement Amendments and Other Ownership Changes
-

If the Commission was to move from lottery to auction, the Commission would have to either set up procedures to insure participation by minorities, women, rural telcos and small businesses,¹⁰ or else explain why it could not rationally do so. If the Commission decides not to give special preferences to those groups (or grants preferences which are insufficient to overcome the deep pockets of the regional Bell operating companies), then unserved area auctions will be delayed several years while members

⁹ See, e.g., Public Notices, Reports Nos. CL-93-79, released April 14, 1993, CL-93-101, released June 1, 1993, and CL-93-120, released July 12, 1993.

¹⁰ See Title VI, §6002, of Budget Act of 1993.

of preference groups prosecute their court appeals.¹¹

Accordingly, we can safely assume that the Commission will accompany any final unserved area auction rules with a set of preference rules. And if the Commission does that, the Commission will have no choice except to give all pending applicants an opportunity to amend their ownership structures, through partial settlements and otherwise, to maximize their opportunities for succeeding under the new rules. The resulting flood of amendments, including ownership changes, will not only become an administrative nightmare for the Commission, but a disaster for the public, as the delay in licensing will be extended for years (not months) while the Commission staff catalogs the mountains of paper.¹²

For the Commission to move from lottery to auction for these pending unserved area applications now is to delay licensing from approximately March, 1994 (the date licenses could expect to be issued if lotteries are held in December 1993) until literally the end of this century, if the MMDS experience with pre-selection preference amendments is any guide. (See n.12, supra.) Given that

¹¹ No one will pay anything for these authorizations while such appeals are pending, so holding any auction while appeals are pending would be futile.

¹² Probably the single most useful procedural rule adopted by the Commission for cellular was Section 22.918(b), adopted in Cellular Lottery Order, 98 FCC 2d 175, 56 RR.2d 8, 39-40 (1984). That Section prohibits all amendments (even \$1.65 amendments) prior to a winner being selected. Significantly, by implementing this rule, the Commission has been able to license all 305 MSAs and over 95% of the RSAs. In contrast, in MMDS, where pre-lottery amendments were still allowed (and \$1.65 amendments still required), the Commission has yet to process hundreds of applications filed in September, 1983, more than ten years later!

the Commission has already barred applications for these markets for over ten years (since June 7, 1982) in some cases, it is not only arbitrary and capricious but bordering upon insane for the Commission to so further delay initial licensing of these unserved area markets.

B. Moving to Auctions for Pending Unserved Area Applications Would Violate the Procedural Due Process Rights of Applicants and Be Arbitrary and Capricious

It may be that Congress, not knowing the details of pending applications for a myriad of services, left the Commission a degree of discretion to implement auctions for some pending applications.¹³ However, Congress did not give the Commission discretion to go to auction in any context where to do so would violate the procedural due process rights of pending applicants, or where to do so would be arbitrary or capricious. In this case, hundreds of applicants have expended millions of dollars to prepare and prosecute the pending applications, which expenditures are in addition to over one million dollars in FCC filing fees tendered by those applicants. Here, to move retroactively to auction would violate the procedural due process rights of the pending applicants. In addition, it would be arbitrary and capricious.

The Small RSA Operators are aware that when, in 1984, the Commission moved from comparative hearing to lottery, the

¹³ But see discussion in Part IV, infra.

Commission's action was upheld.¹⁴ However, unserved area applications are so different from top-90 market cellular applications or any applications for other services, that unserved area applications compel a different result.

The facts here are easily distinguished from Maxcell, supra, where California Portaphone, a loser in the Fresno MSA lottery, appealed the post-filing change from comparative hearing to lottery. In affirming the Commission's discretion in that case, the Court relied heavily upon three critical factors: a) the lottery statute was in place before Portaphone filed its application; b) the FCC had expressly warned all potential top-90 MSA applicants pre-filing that it might, post-filing, change its mind and shift from comparative hearing to lottery, so California Portaphone had no right to rely on being in a comparative hearing; and c) the move from comparative hearing to lottery actually made it less expensive for California Portaphone to prosecute its application. See Maxcell, supra.

None of those three critical factors are present here. When the unserved area applications were filed, there was no auction authority in the statute, and no notice had been provided by the FCC that auctions might be used. Auctions are not less expensive for applicants than are lotteries. Auctions require preferences, and thereby materially harm non-preference applicants. The unserved area situation is so completely different from Maxcell as

¹⁴ Cellular Lottery Order, supra, aff'd. sub nom. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987) (hereafter "Maxcell").

to virtually ensure reversal in Court, should the Commission go forward as proposed.

There are still other distinctions present here. Top-90 market cellular applicants did not need a firm financial commitment, nor were they restricted in terms of post-licensing modifications. Hence, they incurred no loan commitment fees pre-filing and did not need to spend extra dollars pre-licensing to get the right locations.

In contrast, due to the onerous unserved area basic qualifications standards and the equally onerous post-licensing restrictions, unserved area applicants had to expend substantial sums pre-filing for firm financial commitments and cell site engineering. This substantial capital investment, which the Commission required the applicants to incur, distinguishes the unserved area applicants and renders any post-filing shift to a lottery both a denial of due process and an unauthorized taking of a valuable property right. Additionally, in 1984 the top-90 market applicants had not paid the Commission anything, there being no filing fees back then. In contrast, here the Commission has been paid over a million dollars in cash consideration, and cannot now renege performing the random selection function for which it was compensated.

Finally, when the Commission moved from comparative hearings to lottery, no pending applicant was disqualified or placed at a competitive disadvantage. In contrast, here the Commission will have to either disqualify or disadvantage those applicants which

are not minorities, women, small businesses and rural telcos, and such a post-filing skewing of the competition among applicants violates procedural due process.

III. Congress Intended That The Commission Use Lotteries For The Unserved Area Applications Filed and Pending Before July 26, 1993

The intent of Congress in allowing the Commission some discretion in the use of auctions as opposed to lotteries for some pending applications filed before July 26, 1993, was that the Commission would use the lottery selection method anytime there were a large number of pending applications for a particular radio service. This Congressional intent is apparent from the October 18, 1993 letter from Senator Dianne Feinstein to Mr. Steve Roberts, copy attached hereto as Exhibit A. In her letter, Senator Feinstein specifically states that application of the competitive bidding process is "not retroactive" and that applications pending as of July 26, 1994 "will not be subjected to the bidding process." Id.

CONCLUSION

In the case of pending unserved area cellular applications, the Commission already had succeeded in stopping "speculation", so there was no "abuse" to be remedied by auctions. In any event, the need to finish licensing these markets quickly and inaugurate service is the paramount concern, and that goal is best met by conducting the lotteries as soon as possible. The delays inherent in a midstream shift to auctions would preclude initiation of service for years, possibly to the next century.

Moving to auctions in midstream would also be arbitrary and capricious, and deny the due process rights of pending applicants. Finally, moving to auction in midstream on pending unserved area applications flies in the face of Congressional intent in the Budget Act of 1993, and therefore exceeds the Commission's authority.

Accordingly, the proposal auction these pending applications should be discarded, and lotteries promptly conducted.

Respectfully submitted,

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United States Senate

WASHINGTON, DC 20510-0804

October 18, 1993

Mr. Steve Roberts
President
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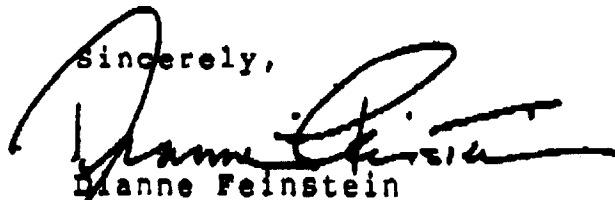
Dear Mr. Roberts:

Thank you for contacting me about the proposal to auction off radio spectrum licenses.

As you may know, this measure was included in the Budget Reconciliation bill recently passed by Congress and signed into law by the President. This law eliminates the lottery process by which frequencies on the radio spectrum were previously assigned. Those businesses selling direct access to the airwaves will now receive their licenses through competitive bidding. This policy is not retroactive; those applications for licenses pending with the Federal Communications Commission as of July 26, 1993, will not be subject to the bidding process. Applications for Interactive Video and Data Services licenses will also fall under the new auction process. However, those coming from the top nine markets will continue to be given out on a lottery basis.

I hope this explanation is helpful. Please do not hesitate to let me know if I can be of further assistance to you.

Sincerely,



Dianne Feinstein
United States Senator

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